October 31, 2005

Defense Acquisition Regulations Council
OUSD(AT&L)/DPAP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

Attn: Bill Sain

By email: dfars@osd.mil

Ref: DFARS Case 2004-D033 "Levy on Payments to Contractors"

Dear Mr. Sain:

On behalf of the Professional Services Council, I am pleased to submit the following comments on the referenced DFARS interim rule, published in the Federal Register on September 1, 2005. The interim rule is intended to address contract non-performance that may result from application of a levy. The rule requires DoD contractors to promptly notify the contracting officer if a levy that will jeopardize contract performance is imposed on a contract.

As you know, the Professional Services Council (PSC) is the leading advocate on legislative and regulatory policies that affect the government professional and technical services industry. PSC represents hundreds of companies of all sizes that provide a full range of services, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, and environmental services, to the federal government. PSC's mission is simple and focused: Expand the government market for professional and technical services providers and foster a business climate that enables fair competition, best value for the government and the taxpayer, and a thriving partnership between the public sector customer and the private sector provider.

We have recently had several opportunities to assist our member companies in dealing with the Treasury Offset Program and in reconciling the levy program with contract payments. We have numerous concerns with the operation of the Federal Payment Levy Program (FPLP) under the Treasury Offset Program (TOP); although not part of this specific rulemaking, these operational issues have a direct and significant bearing on the current rule and on the contractor's execution of this rule. As such, we strongly encourage DoD to review the interaction between DoD and the TOP and FPLP programs, with a particular focus on the procedural requirements to notify the contractor, to the maximum extent practicable, before DoD notifies Treasury of a contract debt. Earlier this year, Treasury modified its own regulations to provide notification to a contractor when a debt is incurred and becomes subject to withholding.

This interim rule adds a new subpart to FAR Part 232, relating to contract financing, and adds a new clause relating to levies on contract payments.

Subpart 232.71

1) Subpart 232.7100 prescribes the scope of coverage of the subpart, and refers only to the effect of levies "pursuant to 26 U.S.C. 6331(h)." While subsection 6331(h) addresses the amount of authorized withholding, the FPLP is established under Sections 6331 and 6332 of the Internal Revenue Code. We recommend that the reference in this subpart include the entire FPLP program under Sections 6331 and 6332.

2) Subpart 232.7101(a) provides that the contracting officer shall require the contractor to promptly (1) notify the Procuring Contracting Officer when a levy "that will jeopardize contract performance" is imposed on a DoD contract, and (2) advise the contracting officer whether the "inability to perform" may adversely affect national security. We have several concerns with this subsection (a).

First, we believe the rule unnecessarily requires a mandatory report to the contracting officer by the contractor (including a report of "no affect") regarding the assessment of the affect on national security, even if the contractor concludes that the levy will not create an "inability to perform" and the contractor's view is that the withholding will have "no affect" on national security. We do not interpret the rule as requiring an automatic report under the first requirement unless the contractor concludes that the levy will actually jeopardize contract performance; however, we believe there is an ambiguity in the rule concerning the extent of the reporting requirement, particularly when the contract clause (at 252.232-7010(b)) requires a mandatory report only when "a levy is imposed … and the levy will jeopardize contract performance" because the contractor is required to report on both the jeopardy to contract performance and whether there will be any affect on national security.

Second, the tests under the rule applied to the two requirements on contractors under this subpart are different: "jeopardize contract performance" versus "inability to perform." Under the former circumstance, the payment withholding may be in error, have only a limited, temporary impact to on-going contract performance or is expected to be resolved in a timely manner. In the latter circumstance, we believe the test of "inability to perform" is a more difficult standard for the contractor to assess, and that assessment is only relevant when coupled with a further determination of the adverse impact of such "inability" on national security. Furthermore, the determination of the impact on national security imposes a very difficult judgment for the contractor -- and may be beyond the contractor's knowledge and capability.

Finally, by explicitly imposing the requirement on the contractor to notify the "procuring contracting officer" (PCO), the administrative contracting officer (ACO), who is often different from the PCO and is charged with on-going contract administration responsibility, may not be provided that same critical information about the contractor's assessment of the impact on contract performance and national security as a result of any levy imposed; apart from addressing the financial implications of the withholding, an ACO may be in a position to take other actions to mitigate or recover from such withholding and the contractor's initial determination. While there is no explanation in the Supplemental Information or elsewhere as to why the PCO is

exclusively designated as the point of contact, we believe the ACO should be "in the loop" on such important matters, and therefore recommend that the rule direct the contractor to also provide notice to the ACO designated in the contract, if one is named.

3) Subpart 232.7101(b) requires the contracting officer to promptly notify the Director of Defense Procurement in two circumstances: (1) when the "contractor's inability to perform" will adversely affect national security, presumably based, in part, on information provided by the contractor pursuant to its mandatory reporting requirement under the clause and, in part, by the PCO's assessment of the contractor's rationale and documentation; and (2) when the "contractor's inability to perform" will result in significant additional costs to the Government. However, neither the policy prescription nor the clause requests information from the contractor on whether the levy will have any impact on the government's cost.

Furthermore, while DoD's internal processes are generally not a matter of interest to contractors, we recommend that the rule and the PGI guidance accompanying the rule be expanded to require concurrent PCO notification to the procuring agency's senior procurement executive.

4) Subpart 232.7102 provides the application for the clause and requires it to be included in all solicitations and contracts. While every contractor is certainly at risk for withholding under the FPLP, the reality is that not every contract provides the same element of risk to the government. We strongly recommend excluding commercial item procurements and procurements below the simplified acquisition threshold from application of the mandatory rule, and providing flexibility to the contracting officer to waive (without significant procedural requirements) the inclusion of the clause in solicitations and contracts where the contracting officer believes the risk of an adverse impact on performance of a contract because of withholding is low.

Subpart 252.232-7010

This subpart adds a new contract clause entitled "Levies on Contract Payments." In addition to the comments above regarding the differing standards to be applied to the contractor's determination, and the circumstances under which notification is mandatory on the contractor, subparagraph (c) provides that "DoD will promptly review the Contractor's assessment and provide a notification" to the contractor. Consistent with the prescription at 232.7101(c), we recommend modifying the clause to provide that the notification to the contractor will be provided by the Procuring Contracting Officer (or, where designated, the ACO).

Conclusion

While we recognize the risk on performance of a DoD contract that could arise from Treasury's action to withhold funds on a specific contract, and generally support reasonable notification to the contracting officer when those funds are withheld, we recommend that the interim rule be promptly revised to address the additional concerns we raise.

Thank you in advance for your attention to these comments. We would welcome the opportunity to discuss these comments in greater detail. In the interim, if you have any questions or need any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at Chvotkin@pscouncil.org.

Sincerely,

Alan Chvotkin, Esq.
Senior Vice President and Counsel